No. 3048.

In the United States
Circuit Court of Appeals
FOR THE NINTH CIRCUIT.

DANIEL M. KELLY,

Plaintiff in Error.

vs.

THE UNITED STATES OF AMERICA,

Defendant in Error.

Brief of Plaintiff in Error

UPON WRIT OF ERROR TO THE UNITED STATES DISTRICT COURT OF THE DISTRICT OF MONTANA.

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W. B. RODGERS, Butte, Montana,
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I. STATEMENT OF THE CASE.

The Plaintiff in Error was adjudged guilty of contempt and fined in the sum of $500.00 and costs taxed at $116.50, by the District Court of the United States, for the District of Montana, and by writ of error seeks to have the judgment reviewed and set aside, by this Court.

The Plaintiff in Error is charged by the information with having visited and conversed with the juror Brown,—

> "with a view on the part of said Daniel M. Kelly then and there had to improperly influence the actions of the said Charles E. Brown, a juror in said case as aforesaid, in his deliberations and determination of the said case then on trial."
>
> Transcript, page 6.

and it is likewise charged that the Plaintiff in Error did furnish and give to the said juror liquid refreshments.

It is not charged, however, that in the giving of such liquid refreshments the Plaintiff in Error had any object or purpose wrongful or otherwise in so doing.

Transcript, page 6.

It is also charged that with the same purpose in view, the Plaintiff in Error did visit and converse with the juror Warner, and did promise said Warner to introduce him to members of the Legislative Assembly

of the State of Montana, then in session, for the purpose of securing for the said Warner aid and assistance and support of said members in the passage of a certain bill in which the said Warner was interested.

Transcript, pages 6 and 7.

The information charged Plaintiff in Error jointly with one Albert J. Galen with contempt of court, but the charges as they affect this plaintiff in error are as above set forth.

The findings, decision and opinion of the Court are by reference made a part of the judgment (Transcript pages 282, 283), so that in the consideration of the questions as to whether or not the evidence supports the findings of the Court, as disclosed in the opinion, and upon which the judgment is based, and as to whether or not the Court properly applied the law to the facts as found, it will be necessary to refer, in presenting this matter, to the evidence and to the opinion of the Court, which is made a part of the judgment.

It appears from the record that this Plaintiff in Error, together with Albert J. Galen, with whom he was jointly charged herein, were counsel for two defendants, Alderson and Rae, in the case of the United States v. Alderson, Rae and others, and that the jurors Brown and Warner were members of the trial jury at the time that the alleged contempt was committed.

II. SPECIFICATIONS OF ERROR.

1. The Court erred in its conclusion that the conduct of the plaintiff in error constituted misbehavior obstructing the administration of justice.

2. The Court erred in adjudging plaintiff in error to have been guilty of contempt of court.

3. The Court erred in imposing a fine upon the plaintiff in error.

4. The Court erred in finding the plaintiff in error guilty of three separate acts and imposing punishment in one judgment.

III. ARGUMENT.

1. Does the information state facts sufficient to constitute a contempt of court, and is the judgment such a judgment as is prayed for in the complaint?

(a). Is a verification of an information or complaint of this character "on information and belief" sufficient?

A complaint of this character is criminal in its nature and is governed by the rules applicable to a criminal complaint. That this character of proceeding is criminal in its nature is too well settled by authority to require argument.

New Orleans v. Steamship Co., 20 Wall 387;
Hays v. Fischer, 102 U. S. 121;
In re Swan, 14 Sup. Ct., 225, 230, 150 U. S. 637;
In re Acker, 66 Fed. 290.

The defendants are entitled to the presumption of innocence and they must be proven guilty beyond a reasonable doubt.

Gompers Case, 221 U. S. 418.

The information in this case is verified on information and belief.

Transcript page 8.

That the complaint must be verified positively in order to give the Court jurisdiction would seem to be well settled by authority.

Herdman v. State, 74, N. W. 1097;
Thomas v. People, 23 Pac., 326 (Colo.);
Hawthorne v. State, 64 N. W. 359;
Freeman v. City, 66 N. W., 928 (S. Dak.);
State v. Conn, 62 Pac., 289 (Ore.);
State v. Newton, 14 Am. & Eng. Ann. Cases, 1035.

(b). Is the prayer of this complaint sufficient to give the court jurisdiction to inflict any punishment upon the contemners, either by way of fine or imprisonment?

The prayer is as follows:

> "WHEREFORE it is prayed that a citation issue out of this Court directing the said Daniel M. Kelly and Albert J. Galen to show cause on a day certain before this Honorable Court why they, and each of them, should not be adjudged in contempt of this Court."
>
> Transcript, page 7.

The prayer does not in any way ask the Court that the contemners, or either of them, be fined or imprisoned, or otherwise punished if they should be adjudged in contempt.

The prayer is a necessary portion of a complaint or information in a contempt case, and the court can grant no relief or inflict any punishment unless the same be prayed for in the information.

Gompers case, 221 U. S. 418;
Phillips Co. v. Amalgamated Ass'n., 208 Fed. 335;
Loveland on Bankruptcy, 4th Edition, page 1247.

> "The prayer or request of the petition or motion should be for an order or rule requiring the contemner to appear in Court at a certain time and place, and show cause why he should not be attached and punished for contempt."
>
> Loveland on Bankruptcy, 4th Edition, page 1247.

In the Gompers Case, the Supreme Court of the United States, after discussing the difference between civil and criminal contempts, uses the following language:

> "But in either event, and whether the proceedings be civil or criminal, there must be an allegation that in contempt of court the defendant has disobeyed the order, and a prayer that he be attached and *punished* therefor."
>
> Gompers Case, 221 U. S. 418 at 441.

And again the Supreme Court in the same case says, at page 448:

> "We have already shown that in both classes of cases there must be allegation and proof that the defendant was guilty of contempt, *and a prayer that he be punished.*"

This language of the Supreme Court of the United States can bear no other construction but that unless there be a prayer that the contemner be punished for the contempt of which he may be adjudged guilty, the Court is without jurisdiction to inflict such punishment, and this construction is recognized by the District Court of the Southern District of Ohio, wherein it says:

> "The charging paper, whether it be a petition, motion, or affidavit, of which the complaining party avails himself to invoke the court's action, must not be defective in substance but must show on its face facts sufficient to contitute a contempt and to justify the relief sought and must also have an appropriate prayer. If it fails in either of these respects, the accused may avail himself of such defect, even if he did not prior to the hearing of his cause object by motion, demurrer, or answer."
>
> Phillips Co., v. Amalgamated Ass'n. Supra., at p. 345.

The learned Judge quotes the language above quoted from the Gompers case, and proceeds to say:

> "A contempt proceeding is sui generis, and the Supreme Court has specified the form, or at least the essential substance of the form, of prayer for this particular kind of a proceeding, whether punishment or remedial relief, or both, be sought, and has ruled that punishment cannot be inflicted unless there is a prayer for it. * * * * As the proceedings are necessarily criminal, the accused must be presumed to have known the law and were each chargeable with knowledge that, if put on trial on a charge properly framed and found guilty, punishment by fine or imprisonment would follow; but, as no relief was sought save their attachment, they were not apprised that their punishment was the object in view."
>
> Phillips Co., v. Amalgamated Ass'n., Supra., page 345.

From the foregoing it would seem to be finally settled that in the absence of a prayer for punishment in an information or complaint for Contempt of Court, the Court is without jurisdiction to impose such punishment.

2. Does the evidence support the findings of the Court?

The findings of the Court as against this plaintiff in error and upon which this judgment must stand or fall, are as follows:

> "Having in mind the charges and that the presumption of innocence requires their dismissal unless proven beyond reasonable doubt, and taking

note of all matters and things in relation to witnesses and testimony that ought to be considered in the determination of issues, the findings are that during the trial of the criminal case respondent Kelly intentionally and knowingly visited and conversed with Juror Brown, and likewise furnished said juror liquid refreshments and partook thereof with him; that said respondent likewise visited and conversed with Juror Warner and likewise promised said juror introductions to legislators, requested by the juror to promote a proposed bill."

Transcript pages 293 and 294.

In order that we may arrive at the Court's view of the evidence, and determine upon what basis these findings were made, we will first discuss the question of the visit and conversation with Juror Brown.

The Court in its opinion states:

"Positive testimony that Kelly and Brown visited and conversed at length in the hotel lobby is not weakened by their inability to recall it. In view thereof, of their entrance into the bar, drinking together at Kelly's request and expense, the proof is satisfactory that together they went from said visit and conversation into the bar."

Transcript page 294.

The Court evidently did not read the testimony correctly when he bases such a finding upon the fact that both Brown's and Kelly's testimony fails to deny positively any such conversation at the time in ques-

tion. Concerning this matter Brown, the first witness for the Government, testified:

"Q. Now, Mr. Brown, I will ask you if you are not positive that you never talked to Mr. Kelly, except to say how-do-you-do to him during that trial, at any time?

A. Not during the trial, no."

Transcript p. 23.

Again:

"Q. Let me ask you, Mr. Brown to refresh your memory again, if you don't remember having stood in the lobby of the hotel and having talked with him for at least twenty minutes, standing right in the center of the lobby of the hotel.

A. Not during the trial, no.

Q. Not during the trial?

A. No, sir."

Transcript page 19.

Again:

"Q. Well, you know whether or not you walked in from the lobby of the hotel into the bar?

A. I walked in, yes sir.

Q. And with Mr. Kelly?

A. No sir, I did not.

Q. You didn't walk into the bar?

A. I didn't walk in with Mr. Kelly.

Q. Who did you walk in there with?

A. I think it was DeHart, that is my,——I am not positive it was DeHart."

Transcript page 20.

The witness DeHart testified as follows:

"Q. Where did you start talking with him on that occasion?

A. If I remember correctly, Mr. Brown was sitting in the chair near that post at the entrance to the bar, opposite to the entrance to the bar when I came in, and he stopped and talked a few minutes.

Q. That was in the lobby?

A. That was in the lobby, and we walked into the bar, had a drink, or a cigar, I wouldn't be positive which.

Q. You started your conversation talking there in the lobby, and continued, went on into the bar, and had a drink, or a cigar?

A. Yes, sir."

Transcript page 183.

But the Court says: "DeHart, for respondents, testified to entering said bar with Brown, but is unable to identify it as the night Kelly and Brown drank together."

Opinion of Court, Transcript, page 285.

Again, the Court does not take into consideration all of the testimony relative to Mr. DeHart's presence on this evening. The record shows that Mr. DeHart was present in the bar with Brown on one occasion only. It is true that Mr. DeHart was not able to state positively the date of this single meeting and conversation which he had with Mr. Brown at the Placer Hotel, but he does state,—

"I never had but one conversation with him in

the Placer Hotel", and he likewise testified that that was the only time he was at the bar of the Placer Hotel with Mr. Brown, and that if he had been there at any other time, he would remember it from the fact that he identifies positively each of four different meetings he had with Brown with reference to the duties of his office.

Transcript page 184.

Mr. Cowley's recollection is that DeHart was there;

Transcript page 255.

Brown, the first witness for the government, states that DeHart was there at this time;

Transcript page 24.

Rankin, a witness for the government, and close friend of the District Attorney says that DeHart might have been there;

Transcript page 45.

and, Kelly the plaintiff in error, testified positively that DeHart was there.

Transcript page 266.

Mr. Wheeler, the District Attorney was present at the bar incident and did not testify, though he was present at the trial.

So that, while DeHart was unable to recall the exact date of his meeting with Brown, the record is clear, that having had such meeting, it must have been at this particular time and place.

Mr. Kelly, the plaintiff in error, testified as follows:

"Q. Will you describe where you had been, where you came from, and generally what happened at the bar, in your own way?

A. Mr. Galen and myself went to his office that evening some time shortly after dinner, perhaps seven-thirty or eight o'clock—I don't recall,—and we returned to the Placer Hotel around probably ten-thirty, I am not sure as to the time. I know we spent two or three hours in Mr. Galen's office that night in discussing this case, and particularly the instructions of the Court. And we came back to the hotel, and came into the main entrance from Main Street, and turned to the left, and walked into the bar-room and Mr. Wheeler was there.

Q. Just a moment. Did you stop in the lobby at all?

A. No, sir.

Q. Either you or Mr. Galen?

A. No sir, we did not."

Transcript pages 264 and 265.

Again Mr. Kelly testified:

"Q. Just a moment. Do you recall that DeHart was there that night?

A. Yes, DeHart was there when I went in, * * * * Mr. Brown was talking to Mr. DeHart further down the bar than where I stopped with the gentleman with whom I did stop."

Transcript page 266.

Again Mr. Kelly testified:

"Q. Would you say now, Mr. Kelly, that you didn't talk with Mr. Brown in the lobby of the hotel, and about the center of the lobby of the Placer Hotel on the night that you purchased him a drink in the Placer bar?

A. No, I am satisfied I did not. I know I did not prior to that time, because I was up to Mr. Galen's office during all that evening from immediately after dinner until the time that Mr. Galen came into the bar; I didn't leave the bar until after the incident that has been described."

Transcript page 277.

Again:

"Q. Let me ask you, Mr. Kelly, if it is not a fact that Mr. Murphy and myself were standing about ten feet away from you at one time?

A. I don't recall; you might have been.

Q. And wasn't that on the night that you came into the bar afterwards with Mr. Brown?

A. No, I never came into the bar with Mr Brown."

Transcript page 278.

We submit that in the face of these positive statements by the witnesses, that the Court evidently did not read the testimony correctly, and that it was on this misconception of the purport of the testimony that the Court found the facts as it did. If the Court

had not overlooked the testimony of these witnesses, certainly this language would not have been used in the opinion, and it must have been this misconception of the testimony that compelled the Court to find the plaintiff in error guilty as to this particular charge, because the opinion says:

> "In view thereof * * * the proof is satisfactory that together they went from said *visit and conversation* into the bar."
>
> Transcript page 294.

In this connection it is to be observed that the only witness who testified that the plaintiff in error, Kelly, and the Juror Brown came into the bar-room together on that night was the witness W. D. Rankin, whose testimony on that point is as follows:

"Q. Now, who, if anybody, came into the bar while we were there?

A. Mr. Kelly and Mr. Brown walked into the bar.

Q. And where did they walk in the bar, from where were they coming from?

A. From the lobby."

Transcript page 37.

Now let us examine Mr. Rankin's testimony further and see whether or not he did in fact see Kelly and Brown come into the bar-room.

"Q. What way did Kelly and Brown come into the bar?

A. The way I noticed it, Wheeler said, remarked to us that they were about to drink, and that is how I noticed them walking from the door toward the bar.

Q. He remarked that they were about to drink?

A. That Kelly was drinking with that juror.

Q. Before they got up to the bar?

A. Or about to drink; I don't remember the exact words."

Transcript page 45.

Now it is very apparent from this testimony that the first time that the witness Rankin noticed Kelly and Brown in the bar room was when Wheeler, the United States Attorney, remarked "that they were about to drink," or "that Kelly was drinking with that juror." Up until that time the witness had not noticed either Kelly or Brown in the bar-room and, therefore, could not have seen them coming into the bar-room, but saw them when they were approaching the bar, or were about to drink, and from this concluded that they walked into the bar-room together.

There is not another scintilla of evidence in the record to the effect that Kelly and Brown walked into the bar-room together, so that, in addition to the Court's misunderstanding of the positive testimony of both Brown and Kelly that they did not walk into the bar-room together, it is apparent from the testimony of the witness Rankin that he did not see them walk into the bar-room, but saw them at or close to the bar, probably when the United States Attorney Wheeler stated that they were about to drink.

We submit that on testimony of this character this issue was not proven satisfactorily or beyond a reasonable doubt, and that if the Court had not misapprehended the testimony such finding would not have been made.

Further than this Mr. Galen testified:

"Q. Now, reverting, Mr. Galen, to the incident that you spoke of in the bar-room when you said you were present at the time that the Juror Brown was there. Tell the Court what occurred there, as you remember it.

A. I had been working with Mr. Kelly in my office until quite late that night, I don't know exactly the hour, but somewhere near eleven o'clock. We came across from my office to the Placer Hotel.

Q. How far is your office from the Placer Hotel?

A. Oh, about half a block, my office being in the Galen Block at the foot of Broadway, and the Placer Hotel being down the street a distance of about four hundred feet from Broadway.

Q. On the opposite side of the street?

A. On the opposite side of the street. I went with Mr. Kelly to the Placer Hotel, and we proceeded into the bar-room *together*. We got in there; the place was crowded. I lost Mr. Kelly in the center of the bar, and I proceeded along the bar, from east to west, looking them over to see who was there. I turned around and started back out toward the east, paying no more attention to Mr. Kelly. I noticed

Mr. Rankin and Mr. Wheeler standing at the end of the bar."

Transcript 200 and 201.

Again:

"Q. Do you recall at that time of seeing Mr. Brown and Mr. Kelly come in the bar together?

A. I didn't see them come in together. Mr. Kelly came came in with me. I didn't know where Mr. Kelly went, and the first that I saw of Mr. Brown was when you called my attention to him."

Transcript page 204.

Now it is apparent that when Kelly and Galen came into the bar-room the witness Rankin and the United States Attorney Wheeler were standing there at the bar. Kelly and Galen came directly from Galen's office to the hotel and went directly into the bar-room without stopping in the lobby; the bar-room was crowded.

Transcript page 203.

Also Mr. Kelly testified:

> "The bar-room was crowded with people who were drinking, standing behind each other, because at that time of the evening the bar-room was crowded on that evening, as it is every evening, or has been since this legislature has been in session."

Transcript page 269.

It can be readily seen how easily the witness Rankin might have been mistaken as to where Kelly and Brown came from, or whether or not they came into the bar-room together, in view of the crowded condition of the bar-room and in view of the fact that he did not see them, nor was his attention called to them, until Mr. Wheeler said, "they were about to drink" or "That Kelly was drinking with that juror."

It is evident from this testimony that the witness Rankin did not see Kelly and Brown enter the bar-room together, and in the face of positive testimony on the part of both Kelly and Brown that they did not so enter the bar-room together, which testimony is corroborated by the testimony of DeHart and the testimony of Galen, we submit that the Court was not justified in finding beyond a reasonable doubt this issue against the plaintiff in error Kelly.

In the case of United States v. Carroll, 147 Fed., 947 at 954. Judge Wolverton, speaking of the sufficiency of the proof, says:

"As to the alleged attempt to influence the witness Paulson, the testimony is too unsatisfactory upon which to find the accused guilty, beyond a reasonable doubt. Paulson was dull and sluggish in testifying, confining himself to merely asserting and reasserting, without stating intelligently any of the attending facts and circumstances, that Carroll said that he (Paulson) 'didn't need to say the fences was closed.' This the defendant contradicted flatly, and with

it there was some corroboration. I am unable to say, therefore, under the evidence, that defendant is guilty in the particular alleged by Paulson's affidavit."

Again it is to be remembered that the Court states that,—"the proof is satisfactory that together they went from said visit and conversation into the bar," because the Court finds that both Kelly and Brown did not testify positively that such a visit in the lobby did not occur, when the record clearly discloses that the Court was mistaken in this view of the testimony.

Opinion of the Court, Transcript page 294.

The visit of the plaintiff in error Kelly with the Juror Warner is admitted and the only evidence as to the nature of this visit or conversation is furnished by the juror and the plaintiff in error.

It is apparent from this record that the Juror Warner was particularly interested in a certain bill, which had been, or which he hoped would be introduced in the Legislative Assembly of the State of Montana, then in session. It appears, from the record that the Juror Warner is a steel-worker engaged in the repair of steel cars and things like that, and no doubt was intensely interested in the legislation in that it would probably affect him in his employment.

Transcript page 113.

It is also clear from the record that he was advised that the plaintiff in error Kelly, and also Galen, were acquainted with members of the Legislative Assembly, and Senator Williams, then State Senator from Powell County, had suggested to Mr. Warner that he seek introductions from Messrs. Kelly and Galen on that account.

Transcript page 97.

Pursuant to such suggestion Warner sought Kelly out in the lobby of the Placer Hotel, presented his bill to him and asked for introductions to members of the Legislative Assembly. Warner's version of the conversation is as follows:

"Q. What was the nature of the conversation that you had with him?

A. The only thing that I remember, the conversation of any description I had with Mr. Kelly was, would he be kind enough to introduce me to some members of the house, that I had a bill.

Q. Did he introduce you to anybody, or tell you that he would?

A. No sir; he never told me that he would, if my memory serves me, I don't think he did.

Q. Do you know whether or not he did?

A. That is as near as I can answer that, as far as my memory serves me right, I don't think he did."

Transcript pages 106 and 107.

The plaintiff in error Kelly stated in reference to this conversation,—

"Mr. Warner came up to me and handed me this bill,—I think it is the bill that was exhibited here. At any rate, it was a bill concerning some railroad legislation that he was interested in, and I looked at it casually, and he asked me what I thought about it. I told him I didn't know anything about the railroad business, or what the effect of this bill was. He said if I would introduce him to the members from Silver Bow County, the members of the House, and I told him that he had better wait until after this trial, that I didn't care to do it now, or words to that effect."

Transcript page 271.

From this testimony alone, and there is no other testimony in the record concerning this conversation, the Court finds,—

"that said respondent likewise visited and conversed with Juror Warner, and likewise promised said juror introductions to legislators, requested by the juror to promote a proposed bill."

Transcript pages 293 and 294.

The Court can understand the position the plaintiff in error was in when requested by this juror that he, Kelly, introduce him to members of the Legislative Assembly, Kelly knowing that Warner was a juror, and feeling as he must have felt the necessity of courteous treatment, and likewise feeling that he must refrain from doing anything that would in-

fluence this juror in any manner, either for or against his clients.

Is it not much more reasonable to assume that in making the remark that he did make the plaintiff in error was simply reminding the juror of the fact that he was a juror and that he must not ask the attorney for any favor of this character while the case was on trial?

Again, there is no promise in the statement made by Kelly that he would introduce him at any time later and the inference must be that until after the trial he did not care to consider the proposition. Kelly might have rejected the juror, wounded his feelings and prejudiced the juror against himself and his clients in the trial of the case. We submit that such conduct would have been more reprehensible on the part of a lawyer than the language used by the plaintiff in error.

Certainly the court was not justified in finding beyond a reasonable doubt that such language imported a promise on the part of Kelly to do anything for the Juror Warner to assist him in the legislation he was interested in, or otherwise.

It is apparent that the plaintiff in error did not voluntarily seek out the juror Warner, but that the juror sought Kelly in pursuance to the suggestions made by Senator Williams, and that the language and conduct of Kelly under the circumstances indicate a total lack, not only of any intention to commit a contempt of court, or to improperly influence

the juror, but it is also evident that he avoided any suspicion thereof by declining to introduce the said juror to members of the legislature who were thereabout in the hotel.

It is to be noted also that on each of these occasions there were no secret conferences, or anything in the conduct of the parties that would indicate any wrongful motive or purpose in them.

> "To see an attorney or his assistant and a juror off in some corner or by-way, in secret conversation, is one thing, and seeing them with several jurors, witnesses, and others, including the opposing lawyer, in general run of conversation on the subject of hunting, is quite another thing. The latter was what occurred in this case.
>
> "Furthermore, the record shows that at no time was the defendant with the jurors, or either of them, alone. At no time did he approach them or seek them out. At no time did he talk of the case on trial, and at no time did either of them propose or suspect he was endeavoring to influence them; and in no respect did what occurred in anywise affect their action in the case."
>
> State v. Clark (Mo.), 114 S. W. 536;
> Kennedy v. Holladay, 105 Mo. 24, 16 S. W. 688.

IV. The judgment and sentence of the court cannot be sustained unless the three separate charges

of contempt, as found by the court, are each sufficiently pleaded and sustained by the evidence.

The court found the plaintiff in error guilty of three separate charges and made three separate findings, namely:

> (1) That "Kelly intentionally and knowingly visited and conversed with Juror Brown."
>
> (2) "and likewise furnished said juror liquid refreshment and partook thereof with him;"
>
> (3) "that said respondent likewise visited and conversed with Juror Warner and likewise promised said juror introductions to legislators, requested by the juror to promote a proposed bill."
>
> Transcript, pages 293-294.

On these findings a single judgment and sentence is pronounced. We have heretofore discussed the sufficiency of the evidence to support each of these separate findings. In order to affirm this judgment this court must find that each of the three separate charges are sufficient in law and in fact, and if any one of the three separate charges is not properly pleaded or fails of proof, the judgment cannot be affirmed.

> "Instead, therefore, of affirming the judgment if there is one good count, it should be reversed if it should appear that the defendants have been sentenced on any count which, in law or in fact, did not constitute a disobedience of the injunction."
>
> Gompers Case, 221 U. S. 418 at 440.

V. Is wrongful intent or improper motive necessary to a conviction?

The Court failed to find from the evidence, and from the circumstances disclosed in the trial of the case, that the plaintiff in error in doing any of the things charged had any intention, by his conduct or actions, of influencing the jurors, or either of them in their deliberations as jurors. On the contrary the court expressly states in the opinion that intention on the part of the contemner to influence the juror is not necessary.

"Lack of evil intent goes only in mitigation."

Transcript (Opinion of Court), page 299.

We submit that in this the court is in error. The courts, so far as we are able to find, are unanimous in holding that in the case of criminal contempt, which is this case, for the reason that it involves nothing in the nature of the enforcement of civil rights, but rather punishment and vindication of the dignity and rights of the court, the court must find every element of the offence charged, including the wrongful intent, proven beyond a reasonable doubt.

In the case of United States v. Carroll, 147 Fed., 947 at 952, Judge Wolverton uses the following language:

> "It is, however, a principle very well settled that accusations for contempt, especially where

> of criminal import, must be supported by evidence sufficient to convince the mind of the trier, beyond a reasonable doubt, of the actual guilt of the accused, and every element of the offense, including the criminal intent, must be proved by evidence or circumstances warranting an inference of the necessary facts.

To the same effect in United States v. Jose (C. C.), 63 Fed. 951. In this last mentioned case the contemner was charged with having acquired the possession of logs from a representative of the receivers of the court by falsely representing to him that the receivers had consented to his taking possession thereof. The court says:

> "Without proof of knowlege on the part of the defendant of the lack of authority in Pates to release the logs, and without convincing evidence that the defendant did fraudulently induce Pates to surrender the logs by falsely representing to him that the receivers had consented thereto, I can find no facts warranting an inference of the *criminal intent necessary* to justify the infliction of punishment."
>
> United States v. Jose, at page 954.

In the case of Ex Parte Wright, 141 S. W. 971, the contemner Wright was charged with contempt of court in conversing with a juror, and was by the District Court adjudged not guilty of contempt. The court uses the following language:

> "The testimony of the special venireman does not indicate that relator undertook to influence him or even to talk about the case in any way. The conversation as detailed by the juror is that relator said to him, 'You are on the jury next week.' The juryman said, 'Yes, I know I am,' and they separated. Under this testimony, we are of opinion that the judgment for contempt should not have been entered or punishment assessed."

In other words the court found that conversing with a juror is not contempt of court, unless the conversation or the attendant circumstances justify the court in finding, and the court must find, that in so doing the contemner intended by such conversation, or attempted by such conversation, to in some way influence the juror and thereby obstruct the administration of justice.

141 S. W. 971 at 973.

The Supreme Court of Illinois states the rule as follows:

> "Before a person can be found guilty of contempt of court it must clearly appear that in committing the offense complained of he was actuated by some malevolent intention to assail the dignity of the court, or to wilfully and knowingly interfere with its procedure or due administration of justice. *There must be a union or joint operation of act and criminal intention.*"

People v. Hille, 192 Ill. App., 139 at 149.

Again the same court says:

> "Before inflicting any punishment on appellant, it should, therefore, clearly appear, inasmuch as the act constituting the alleged contempt occurred out of the presence of the court, that he was actuated by some malevolent intention to lower or assail the dignity of the court, or wilfully and knowingly interfered with the administration of justice. Even in civil contempts there must be an intent to do wrong or a wilful refusal to comply with the order of the court."
>
> Powers v. The People, 114 Ill. App., 323 at 326.

The Supreme Court of North Carolina, in re Odum, 45 S. E. 569, says, as follows:

> "If a finding of these facts had been made upon the evidence, and then a further finding of fact that it was the intention and purpose of Odum to corruptly and unlawfully influence the verdict of Herring and Mathis, we would deem the finding justified by the evidence and would affirm the judgment. It was a case of unlawful interference with the proceedings in an action, and was punishable as for contempt, under subsection 3 of section 654 of the code. It is true that in the judgment Odum's conduct was set out, but that was not sufficient. The facts should have been found and filed in the proceedings—*especially that fact concerning the purpose and object of the contemner*—and the judgment should have been founded on those findings."

See also:

Ind. Water Co. v. Am. Strawboard Co., 75 Fed. 979.

Respectfully submitted,

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